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Upper Tribunal
(Immigration and Asylum Chamber)

QI (para 245ZX(l) considered) Pakistan [2010] UKUT (IAC)

THE IMMIGRATION ACTS

Heard at Field House **On 12 March 2010**	**Determination Promulgated** ……

Before

SENIOR IMMIGRATION JUDGE STOREY

Between

QI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Khan, Legal Representative
For the Respondent: Mr N Bramble, Home Office Presenting Officer

The expression "current … leave to remain" in para 245ZX(l) of the Statement of Changes in the Immigration Rules HC 395 as amended must refer to an applicant's/appellant's substantive period of limited leave. Were it to denote extended leave under s.3C of the Immigration Act 1971 ("s.3C leave"), the expression would be meaningless. Further, at the time the applicant made his application, his leave could only have been his substantive leave; any s.3C leave could not come into being until after he received a decision. That is because s.3C leave does not arise until "the leave expires without the application for variation having been decided' (s.3C(c)).

DETERMINATION AND REASONS

1. The appellant, a citizen of Pakistan, applied on 29 May 2009 for leave to remain as a Tier 4 (General) Student. His application was refused on 6 August 2009 under paras 245ZX(c) and (l) of the Immigration Rules. He had previously had leave as a student (granted 28 May 2008) until 30 May 2009.

2. In a determination notified on 13 October 2009 Immigration Judge (IJ) Jacobs-Jones dismissed his appeal. The appellant was successful in obtaining an order for reconsideration, bringing the matter before me. By virtue of the legislative changes brought into effect on 15 February 2010 the order for reconsideration has effect as if it were the grant of permission to appeal to the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC). The appellant's grounds as developed by Mr Khan maintained that the IJ had erred in failing to take into account a letter from the Association of Certified and Chartered Accountants (ACCA) dated 22 May 2009 showing he was registered with them, erred in finding there had been a breach of para 245ZX(l) and related Policy Guidance and finally erred in considering that the evidence did not establish that the appellant's course was at NQF level 7.

3. Before evaluating these grounds it should be noted that Tier 4 of the Points Based system is of course the tier that caters for international students who wish to study in the UK. It has been implemented in phases, with the main policy changes introduced on 31 March 2009 by HC 314. Tier 4 consists of two categories: Tier 4 (General) Student (which is what concerns us in this appeal) and Tier 4 (Child) Student. Thus the Immigration Rules and corresponding Policy Guidance applied to the appellant in this case were those in force at the time of decision (in August 2009). Since then there have been a number of amendments made to the Rules: CM 7711 (September 2009); HC 120 (December 2009), HC 367 (February 2010); and HC 439 (March 2010). HC 120 amended Appendix A, deleting the requirement for a visa letter in Tables 16 and 17. Its Explanatory Memorandum explained the change from the requirement for a "visa letter" to one for "confirmation of acceptance for studies" as follows:

> "7.5 Tier 4 of the Points Based System caters for students and was launched on 31 March 2009. A previous Statement of Changes (Cm 7701), which came into force on 1 October 2009) provided for the next phase of the roll-out of Tier 4 sponsorship arrangements to allow Tier 4 applicants to earn points for leave to remain applications by using an electronic Confirmation of Acceptance for Studies. Initially, provision for migrants to be granted leave to remain using a visa letter issued by their sponsor was

> retained as a transitional arrangement, as well as for all entry clearance applications. This Statement of Changes removes those transitional provisions, with the effect that, from 22 February 2010, it will be compulsory for a Tier 4 application to be supported by a Confirmation of Acceptance for Studies."

4. The first reason the IJ gave for dismissing the appeal was clearly wrong. He stated that as the appellant had not produced his letter from ACCA showing he was registered with them until he lodged his appeal on 21 August 2009, that letter could not be taken into account. But the said letter was dated 22 May 2009, which was a date prior to his application (made on 29 May). Accordingly the IJ should have considered its relevance under s.85(4) of the Nationality, Immigration and Asylum Act 2002: for analysis of a similar error see NA & Others (Tier 1 Post Study Work-Funds) [2009] UKAIT 00025. I wholly agree with the appellant's grounds for reconsideration at Ground 1. Whether, however, the IJ's error was a material one is another matter to which I shall return later.

5. It is convenient to deal next with the third reason the IJ gave for dismissing the appeal, which was that there was conflicting evidence as to the level and qualification of the degree on which the appellant said he was enrolled with London School of Business and Finance (LSBF). Mr Bramble conceded that the IJ was wrong about this as the ACCA course was at NQF level 7.

6. That brings me to the second reason the IJ gave for dismissing the appeal. Summarised, his concern was that the appellant had not shown he met the requirements of para 245ZX(l) as his course of study at the LSBF was not due to commence until 20 July 2009, i.e. more than one month after his leave to remain expired on 30 May 2009. That was contrary, he said, both to para 245ZX(l) and to para 84 of the relevant Policy Guidance.

7. As to this reason the grounds raised a twofold objection. The first contended that there was no breach of para 245ZX(l), as by virtue of s.3C of the Immigration Act 1971 the appellant had extended leave. Therefore it could not be said that his course was not due to commence "more than one month after his leave to remain expired".

8. The relevant parts of para 245ZX state:

> "*To qualify for leave to remain as a Tier 4 (General) Student under paragraph 24ZX, an applicant must meet the requirements listed below:*
>
> *Requirements:*
> *…*
> *(c) The applicant must have a minimum of 30 points under* paragraphs 113 to 120 *of Appendix A.*
>
> *(d) The applicant must have a minimum of 10 points under paragraphs 10 to 13 of Appendix C.*
>
> *…*
>
> *(l) The applicant must not be applying for leave to remain for the purpose of studies which would commence more than one month after the applicant's current entry clearance or leave to remain expires."*

9. (As already noted, there have been subsequent amendments to these paragraphs of Appendix A, but the wording of para 245ZX(l) remains the same.)

10. I consider the appellant's submissions on this point are ill-founded. Whilst I would accept that the rule is badly drafted, it is inescapably clear that "current … leave to remain" must refer to an appellant's substantive period of limited leave (in the appellant's case, the leave he had from 28 May 2008 - 30 May 2009). Were the above expression to denote s.3C leave, then time would never start to run and the requirement would be meaningless. Further, at the time the applicant made his application, his leave could only have been his substantive leave; his s.3C leave could not have come into being until after he received a decision. That is because s.3C leave does not arise until "the leave expires without the application for variation having been decided' (s.3C(c)). Accordingly, the IJ cannot be faulted for concluding that the appellant's proposed course was not due to commence until more than one month after his leave to remain expired.

11. Before turning to the second objection raised by the appellant to the IJ's approach to para 245ZX(l), I would make two further observations. One is that this requirement is a requirement of the Immigration Rules. It is also specified as a requirement by para 84 of the relevant Policy Guidance, but the latter simply reinforces the effect of para 245ZX(l) and its corresponding Appendix A. Para 84 is not therefore, as the IJ described it at para 12 of his determination, the legal source for the refusal decision. The other observation concerns the fact that not only Mr Khan for the appellant but Mr Bramble for the respondent took the view that para 245ZX(l) should be considered as having no application to the appellant because he had s.3C leave and so time in his case had not started to run. The fact that the respondent as well as the appellant urged such a construction is something I take into account, but I am not bound to regard it as correct and it was not made as a concession in the appellant's case. The Tribunal is obliged to interpret and apply the law as contained in the Immigration Rules. For reasons already given I consider that although erring in one respect on the issue of the relevance of the ACCA letter the IJ correctly concluding that the appellant was caught by para 245ZX(l) and that he was right to find that the appellant could not show his proposed course would commence within a month of expiry of his current leave to remain.

12. That leaves the second objection raised by the appellant to the IJ's finding on para 245ZX(1). It amounted to an assertion that the Court of Appeal in AS (Afghanistan) & NV (Sri Lanka) [2009] EWCA Civ 1076 has held that in the context of this type of appeal the Tribunal is obliged to consider that the appellant's grounds of appeal amount to a s.120 statement (under the 2002 Act) in which the appellant explained the reasons why he should be permitted to stay and not be removed and so:

> "The IJ was under an obligation to consider and determine these grounds and in such circumstances he should have considered the matter as a 'fresh application' made on the day of the hearing".

13. That argument in my view misconstrues AS & NV. In AS & NV the Court of Appeal was concerned with the duty on the Tribunal to consider additional grounds relating to the substance of the decision made against an appellant. It did not rule that such grounds should be understood as a "fresh application". Further, if the Court's reasoning was taken to amount to such a proposition, then there would be no jurisdiction for the Tribunal to deal with the appeal because it would be an application as yet undecided. Section 85(2) refers

to, and presupposes that there has been, a "…decision appealed against", it does not encompass a decision not yet made.

14. In my judgment in the appellant's case the relevant decision under the Immigration Rules imposed a temporal requirement which he failed to meet. Nothing said in his grounds of appeal – whether treated as a s.120 notice or not – alter that.

15. For the above reasons the IJ did not materially err in law. Accordingly his decision to dismiss the appeal must stand.

Signed

Senior Immigration Judge Storey
(Judge of the Upper Tribunal)